

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Eddie J. Smith 55827

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2437

Eddie J. Smith

This review has been taken in accordance with 46 U.S.C. 7702 and 46 CFR Part 5, Subpart K.

By order dated 25 June 1985, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri, suspended Respondent's license for three months on twelve months probation upon finding proved the charge of negligence. The specification found proved alleges that Respondent, while serving as Operator aboard the M/V STEEL CHALLENGER, under the authority of the captioned document, on or about 15 January 1985, failed to maintain adequate control of his vessel and tow thereby allowing the tow to allide with the Greenville Highway Bridge at Mile 531.3, Lower Mississippi River.

That order was appealed. On appeal, the Vice Commandant issued an order in which he set aside the finding of the Administrative Law Judge as to the charge of negligence, vacated the order suspending Respondent's license, and remanded the case to the Administrative Law Judge for further proceedings. Appeal Decision 2437 (SMITH).

On remand, the Administrative Law Judge reopened the hearing. The reopened hearing was held at Memphis, Tennessee, on 3 March 1987. Respondent was not present at the hearing, but was represented by professional counsel. At the hearing the Investigating Officer introduced into evidence his own testimony and five exhibits. Respondent presented no evidence.

After the hearing the Administrative Law Judge rendered a decision on remand in which she made additional findings of fact and concluded that the charge and specification had been proved. The decision on remand was dated at St. Louis, Missouri, on 27 April 1987.

No appeal from the decision on remand has been filed. Because of the issues discussed infra, however, I have elected to use my power to review decisions of Administrative Law Judges in which there has been a finding of proved, as provided in 46 CFR Part 5, Subpart K.

FINDINGS OF FACT

At all relevant times on 15 January 1985, Respondent was serving as Operator aboard the M/V STEEL CHALLENGER, a 170 foot uninspected towing vessel generating 6,200 horsepower, under the authority of his license which authorizes him to serve as Operator of Uninspected Towing Vessels on the Inland Waters of the United States, excepting waters subject to International Regulations for Preventing Collisions at Sea. At approximately 0545 on 15 January 1985, Respondent assumed the direction and control of the M/V STEEL CHALLENGER and its tow approximately eight miles above the Greenville Highway Bridge, mile 531.3, Lower Mississippi River. The flotilla was downbound, enroute to New Orleans, Louisiana. It consisted of twenty-nine loaded barges and one empty barge, and was configured six barges across and five long. The overall length of the flotilla, including the towboat, was 1145 feet; the width was 210 feet. The loaded barges had a draft of nine feet.

The river stage was high, with the gauge at Greenville, Mississippi, reading 41.6 feet. The current was strong at about eight to nine miles per hour.

The Greenville Highway Bridge is located just downstream from a bend in the river which, for downbound vessels, curves to the left. On the left descending bank, on the inside of this bend, are three dikes which extend out approximately 800 feet into the river. During low water, these dikes are visible above the surface. During high water, as existed here, they are submerged and a red channel buoy, placed by the Coast Guard, is normally stationed at the end of each dike. On the morning of 15 January 1985, the dikes were approximately six or seven feet underwater. The three buoys which normally mark the ends of the dikes were missing.

The configuration of the river in this area causes a strong cross-current or "set" from left to right which increases as the river stage increases. This set tends to push towboats and tows toward the right descending bank as they proceed downstream through the bend. Mariners transiting this area downbound rely heavily on the three buoys to assist them in their approach to the Greenville Highway

Bridge. During high water, the common method of navigating through the bend is to keep the port side of the tow as close to the dikes as possible. Otherwise, the strong cross-current will push the tow too far to the right to successfully clear the bridge.

When Respondent assumed the watch on 15 January 1985, he was not aware that any of the three buoys was missing. It is normal practice for operators of both upbound and downbound vessels to exchange information regarding river conditions ahead, and, although Respondent had met upbound boats on his previous watch and there were downbound boats ahead of him, he did not seek or obtain any information from other operators concerning the buoys at the Greenville Highway Bridge.

At some point above the bend, before he was able to see whether the buoys were present, Respondent elected to "steer" his tow through the bridge by navigating close to where he anticipated the buoys would be, as described above. As he rounded the bend above the bridge, he was surprised to see that all three buoys marking the dikes were missing. He attempted to mentally position the dikes in order to properly set up for the bridge, trying to avoid grounding on the dikes with his tow, while keeping as close to them as possible to avoid being carried too far to the right by the cross-current.

As Respondent went under the bridge, the tow's starboard stern barge allided with the right bridge pier resulting in the breakup of the tow and the sinking of one barge.

APPEARANCES: Daryl F. Sohn, Esq., Goldstein and Price, 818 Olive St., Suite 1300, St. Louis, Missouri 63101. William C. Bateman, Jr., Suite 1100, One Commerce Square, Memphis, Tennessee 38103 (at the reopened hearing on remand only).

OPINION

I

This case was remanded to the Administrative Law Judge in order for her to make additional findings of fact concerning any Broadcast Notice to Mariners that may have been made about the three buoys being missing. The reopened hearing was held for that purpose. (Decision On Remand at 2). The exhibits entered into evidence by the Investigating Officer at the reopened hearing consisted of copies of radio logs of Coast Guard Group Lower Mississippi River from 14, 15, and 16 January 1985, a diagram showing the locations and approximate ranges of Coast Guard FM radio transmitting sites located along the

Mississippi and Arkansas rivers, and a copy of a Second Coast Guard District message containing the text of Broadcast Notice to Mariners No. 0109-85.

This evidence led the Administrative Law Judge to make additional findings of fact. The essence of the findings is that the three red buoys were reported missing by Broadcast Notice to Mariners three times in the eighteen hours prior to the allision. (Decision On Remand at 4). The Administrative Law Judge then concluded that Respondent was negligent in failing "to inform himself, when information was available, about conditions which an experienced pilot would have reason to desire information." (Decision On Remand at 7).

This conclusion is supported by substantial evidence. The text of Broadcast Notice to Mariners No. 0109-85 is contained in Exhibit 9. It reads: "Lower Mississippi River Mile 531.3--the T/B MR. LAURENCE has reported 3 red buoys missing." The radio logs introduced as Exhibits 5, 6, and 7 show that Broadcast Notice to Mariners No. 0109-85 was transmitted by Coast Guard Group Lower Mississippi River at 12:35 p.m. local time on 14 January 1985 (approximately eighteen hours before the allision), at 7:11 p.m. local time on 14 January 1985 (approximately eleven and a half hours before the allision), and at 3:17 a.m. on 15 January 1985 (approximately three hours before the allision).

The operator of a vessel has a duty to inform himself of the conditions of the waterway the vessel is transiting. Appeal Decisions 2416 (MOORE) and 2370 (LEWIS). In LEWIS the Vice Commandant defined the duty: "The master or operator of a vessel is expected to know the available information regarding the waterway that he is traversing and the characteristics of his vessel. Failure of a master or operator of a vessel to make proper use of such information . . . is negligence" [citations omitted].

The information that the three buoys were missing was available to Respondent through repeated transmissions as a Broadcast Notice to Mariners. He failed to inform himself of that information, even though the uncontradicted evidence in the case shows that those particular buoys were important to a safe passage through the Greenville Highway Bridge. That failure constituted negligence.

II

In light of the foregoing, several procedural errors on remand warrant discussion. I note that the order of suspension originally

issued by the Administrative Law Judge was vacated by Appeal Decision 2437. The Administrative Law Judge's decision on remand does not reinstate the order of suspension either expressly or by reference to her original decision. See 46 CFR 5.709(d). This oversight leaves the case in a posture in which the charge of negligence has been found proved, but no order of admonition or suspension is in effect.

It appears from the documents filed with the Administrative Law Judge's decision on remand that there was an ex parte communication with the Judge that was not placed on the record. A letter from the Commanding Officer, Marine Safety Office, Memphis, Tennessee, dated 18 December 1986, transmitted evidence (radio logs and Notice to Mariners) to the Administrative Law Judge. By letter dated 23 December 1986 the Administrative Law Judge directed the Commanding Officer of Marine Safety Office, Memphis, to send copies of the above materials to the attorney for Respondent. The letter from the Commanding Officer to the Judge also references a telephone conversation between the Judge and an officer assigned to the Marine Safety Office in Memphis. No details of this call are available. The Administrative Procedure Act, 5 U.S.C. 551-59, which applies to the proceedings in this case, 46 U.S.C. 7702, prohibits an Administrative Law Judge from consulting "a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; . . ." 5 U.S.C. 554(d)(1). If a prohibited ex parte communication is made, the Administrative Law Judge is required to place either a copy of the communication (if it is written) or a memorandum stating the substance of the communication (if it is oral) on the record. 5 U.S.C. 557(d)(1)(C). This was not done with respect to the telephone call referred to above.

By letter dated 9 January 1987 Respondent's attorney objected strenuously to the submission of the radio logs and Notice to Mariners. He requested that the documents be returned and the charge against Respondent dismissed. There is no indication in the record that the Administrative Law Judge ruled on that request, or replied to the letter. This is not in accordance with 5 U.S.C. 555(e), which requires prompt notice and a "brief statement of the grounds" whenever a request of an interested party is denied in connection with any agency proceeding.

After the hearing the parties were given until 30 March to submit any further memoranda to the Administrative Law Judge. Respondent's attorney was given an extension until 23 April to make any submissions. On 23 April Respondent's attorney submitted a motion for

further extension to 27 April, stating substantial reasons for the request. The Administrative Law Judge denied the motion without explanation, again contrary to 5 U.S.C. 555(e).

CONCLUSION

The finding of the Administrative Law Judge that Respondent was negligent in failing to inform himself of river conditions when such information was available is supported by substantial evidence. However, procedural errors by the Administrative Law Judge cause me to conclude that the charges against Respondent must be dismissed.

ORDER

The findings of the Administrative Law Judge dated 27 April 1987 at St. Louis, Missouri, are SET ASIDE. The order of suspension was previously vacated by Appeal Decision 2437, and remains so. The charge is DISMISSED.

J. C. IRWIN
Vice Admiral, U.S. Coast Guard
VICE COMMANDANT

Signed at Washington, D.C. this 25th day of NOVEMBER 1987.

***** END OF DECISION NO. 2437 *****